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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EVAN HIGHTOWER and ANN ROSS, individually and on behalf of
other individuals similarly situated

Plaintiffs,

v.

JPMORGAN CHASE BANK, N.A.,
and DOES 1-10, Inclusive,

Defendants.

CASE NO. CV11-01802-PSG (PLAx)

Related Cases:
2:11-cv-04294-PSG-PLAx
11-cv-6061-PSG-FMOX
11-cv-03428-PSG-PLAx
11-cv-08147-PSG-PLAx
11-cv-09727-PSG-JC

Hon. Philip S. Gutierrez

**MOTION FOR TOLLING OF
STATUTE OF LIMITATIONS FOR
FLSA CLASS MEMBERS**

DATE: January 30, 2012
TIME: 1:30 p.m.
CTRM: 880

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NOTICE OF MOTION

TO: DEFENDANT AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 30, 2012, 1:30 p.m., or as soon thereafter as the matter may be heard in the above-entitled court, located at 255 E. Temple Street, Los Angeles, California, 90012, Plaintiffs will and hereby do move this Court for an Order tolling the statute of limitations for the FLSA putative class members until the date Notice is mailed (or an order denying the mailing of notice is issued) and for any other and further relief that is just and proper.

The Motion will be based on this Notice, the Memorandum of Points and Authorities and Declarations filed herewith, and the pleadings and papers filed herein.

DATED: December 30, 2011

Marlin & Saltzman LLP

By: /S/ Kiley L. Grombacher
Stanley D. Saltzman
Louis M. Marlin
Marcus J. Bradley
Kiley L. Grombacher

**Co-Lead Counsel for Plaintiffs
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DATED: December 30, 2011

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By: /S/ Raul Perez
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I. INTRODUCTION

Plaintiffs Evan Hightower, Ann Ross, Roger Al-Chaikh, Carolyn Salazar, Regina M. Simpson, Regina Sturdivant, Kemah Henderson Taquonna Lampkins, Dennis Khutoretsky, Mikhail Lirman, and Boris Shulman ("Plaintiffs") respectfully request that this Court issue an Order tolling the statute of limitations for the class members of the FLSA collective action until the date Notice is mailed (or an order denying the mailing of notice is issued). Under the Fair Labor Standards Act ("FLSA"), the statute of limitations on a wage claim is generally two (2) years from the date the employees "opt in" to the case (following notice) -- unless the employer's conduct is deemed "willful," which carries with it a three (3) year statute of limitations. 29 U.S.C. Section 255. Due to the number of related cases that have been filed and the efforts undertaken by the parties and the Court to effectively and efficiently consolidate the cases, this Court has not made a determination as to Plaintiffs' collective action notification. As such, despite Plaintiffs' counsels' diligent efforts to expedite the litigation, the employees' claims in the FLSA cases continue to "die daily" until they opt into the action. See e.g., *Hoffman v. Sbarro, Inc.* 982 F. Supp. 249, 260 (S.D.N.Y. 1997). Accordingly, Plaintiffs request that this Court toll the statute of limitations to preserve such claims.

II. RELEVANT PROCEDURAL HISTORY

A. Filing & Consolidation

Several related cases are currently pending before this Court:

1. *Salazar, et al. v. JPMorgan Chase Bank, N.A.*, case number 2:11-cv-04294-PSG-PLAx ("Consolidated Salazar/Al Chaikh Action");
2. *Hightower v. JPMorgan Chase Bank, N.A.*, C.D. Cal. Case No. 11-cv-01802-PSG-PLAx ("Hightower Action");
3. *Simpson v. JPMorgan Chase Bank*, C.D. Cal.

1 11-cv-6061-PSG-FMOx ("Simpson Action");

2 4. *Henderson v. JPMorgan Chase Bank*, C.D. Cal. Case No.

3 11-cv-03428-PSG-PLAx ("Henderson Action");

4 5. *Khutoretsky v. JPMorgan Chase & Co.*, C.D. Cal. Case No.

5 11-cv-08147-PSG-PLA ("Khutoretsky Action"); and

6 6. *Slikker v. JPMorgan Chase Bank, N.A.*, C.D. Cal. Case No.

7 11-cv-09727-PSG-JC ("Slikker Action");

8 On February 17, 2011, Plaintiff Carolyn Salazar ("Plaintiff Salazar") filed a
 9 putative class and collective action complaint on behalf of bank tellers against
 10 JPMorgan Chase Bank, N.A. ("Defendant") on behalf of bank tellers for various
 11 wage and hour claims including but not limited to unpaid overtime wages, unpaid
 12 off-the-clock work, unpaid meal or rest break premium pay, untimely and unpaid
 13 wages upon termination, inaccurate wage statements, inadequate seating, and
 14 unreimbursed business expenses. On March 2, 2011, only weeks after the Salazar
 15 complaint was filed, the Hightower Plaintiffs filed their putative class and
 16 collective action complaint. The *Hightower* Action represents all non-exempt
 17 employees including bank tellers (Ross) and personal bankers (Hightower) for
 18 claims which overlapped with the *Salazar* Action. In the wake of these two
 19 filings, several other cases were filed necessitating Defendant to file motions
 20 transferring such cases to this Court. Such efforts to transfer and consolidate the
 21 cases caused delay in litigation.

22 **B. Drafting a Consolidated Complaint**

23 Following the various orders transferring all of the Related Cases to this
 24 Court, and as a result of this Court's direction at the November 28, 2011 Status
 25 Conference regarding consolidation and coordination of these actions, plaintiffs
 26 have had to analyze and assess all of the various complaints and spend
 27 Considerable time working to coordinate these claims.

1 **C. Status of Discovery**

2 Since many of the related cases were stayed or transferred shortly after
3 filing, only the *Salazar* plaintiffs were able to propound written discovery upon
4 Defendant. Defendant, however, has not yet produced substantive responses to
5 such discovery and, although the *Salazar* plaintiffs initially filed a motion to
6 compel, such motion was withdrawn when the Court relieved Defendant of its
7 obligation to file an opposition, as the need to coordinate and consolidate
8 discovery in the interest of judicial economy were paramount. [Salazar Dkt.44,
9 48].

10 The parties hence have engaged in informal negotiations regarding
11 discovery and have agreed that Plaintiffs shall jointly propound all discovery,
12 responses thereto, and produce responsive documents in a manner that avoids
13 duplicative and overlapping discovery. Such discovery may be usable in evidence
14 in each Related Case, preserving all valid evidentiary and foundational objections.
15 Additionally, Defendant has agreed to serve on Initiative Legal Counsel ("ILG")
16 and Marlin & Saltzman, LLP ("M&S"):

17 (1) all written responses of JPMorgan served in any Related Case, including
18 but not limited to JP Morgan's initial disclosures and its responses to requests for
19 production of documents, requests for admission, interrogatories and other written
20 discovery (which identifies the discovery propounded within the response);

21 (2) copies of all paper documents or electronically-stored information
22 ("ESI") previously produced by JPMorgan either informally or as part of
23 JPMorgan's written responses to written discovery in any Related Action;

24 (3) relevant employee manuals, policies and procedures pertaining to the
25 claims (excluding the seating claim) set forth in the proposed Consolidated
26 Salazar/Al Chaikh Action, Hightower Action and Khutoretsky Action; and

27 (4) responses to the discovery served by counsel for the Henderson Action
28

1 pertaining solely to the seating claim.

2 Additionally, the parties have agreed to mediate before Magistrate Judge
3 Abrams the following disputed issues:

4 a. The production of contact information for putative class members,
5 and if so, the amount of contact information to be produced, what specific
6 information must be provided, the date the information is due, and the format in
7 which the information will be delivered.

8 b. Whether class discovery is warranted prior to class certification, such
9 as the production of wage records, wage statements, payroll records, and
10 timekeeping records (such as time cards) for putative class members, and if so, the
11 amount of such records to be produced, the date the records are due, and the
12 format in which the information will be delivered.

13 Despite the parties efforts to work cooperatively, Plaintiffs will not receive
14 all the information they need to prepare their motion for conditional class
15 certification for several months- thus further delaying notice to the class members.

16 **III. GUIDING LEGAL AUTHORITY**

17 **A. There is No Automatic Tolling of the Statute of Limitations In** 18 **FLSA Collective Actions**

19 Unlike Rule 23 class actions, the commencement of an FLSA collective
20 action does not toll the statute of limitations for putative class members. 29 U.S.C.
21 § 256(b). Thus, absent an order from the court tolling the applicable statute of
22 limitations period, the limitations period for each putative member of the class
23 would be three years (assuming the allegation of a willful violation of the statute)
24 prior to the date he or she opted into the action. *Id.* §§ 255(a), 256(b). As
25 then-District Judge, now Supreme Court Justice Sotomayer explained, in FLSA
26 cases employees' claims continue to "die daily" until the plaintiff opts into the
27 action. *Hoffman v. Sbarro, Inc.* 982 F. Supp. 249, 260 (S.D.N.Y. 1997).

1 Courts rightfully treat this problem with the utmost seriousness. As the
 2 Supreme Court held in *Hoffman-LaRoche v. Sperling*, the benefits of the collective
 3 action "depend on employees receiving accurate and timely notice concerning the
 4 pendency of the collective action, so that they can make informed decisions about
 5 whether to participate." 493 U.S. at 170. If plaintiffs are not informed of their
 6 rights in this lawsuit before their statute of limitations run, the benefits inherent in
 7 an FLSA collective action and outlined by the Supreme Court in *Hoffman-La*
 8 *Roche*, will disappear. 493 U.S. at 170.

9 **B. This Court May Use Its Equitable Powers To Toll The Statute Of**
 10 **Limitations.**

11 The equitable tolling doctrine is read into every federal statute of
 12 limitations, including the FLSA. *Genarie v. PRD Mgmt., Inc.*, No. Civ. A.
 13 04-2082(JBS), 2006 WL 436733, at *15 (D.N.J. Feb.17, 2006). This doctrine
 14 permits a court to exercise its discretion to extend a plaintiff's statute of
 15 limitations. As the Ninth Circuit Court of Appeals has recognized, equitable
 16 tolling is "read" into the Fair Labor Standards Act and courts regularly grant
 17 equitable tolling in FLSA cases. See *Partlow v. Jewish Orphans Home of S. Cal.,*
 18 *Inc.*, 645 F.2d 757, 760 (9th Cir.1981) (abrogated on other grounds by
 19 *Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480
 20 (1989); see also; *Huss v. City of Huntington Beach*, 317 F.Supp.2d 1151, 1161
 21 (C.D.Cal.2000) ("Section 255(a) is, however, subject to the doctrine of equitable
 22 tolling"); *Beauperthuy v. 24 Hour Fitness USA, Inc.*, 2007 WL 707475, *7-8 (N.D.
 23 Cal. March 6, 2007) (granting equitable tolling in FLSA collective action).¹

24
 25
 26 ¹ In fact, equitable tolling of FLSA cases is regularly granted in courts throughout the
 27 country. See also *In re Directech Southwest, Inc. Fair Labor Standards Act Litigation*, MDL
 28 08-1984, Order (E.D. La. March 3, 2009) (ordering tolling of FLSA plaintiffs and opt-in
 plaintiffs' statute of limitations until the Court ruled on summary judgment); *Lew v.*

1 "[E]quitable tolling concerns itself with the equities of dismissal for
 2 untimely filing caused by factors independent of the plaintiff. Accordingly, we
 3 must ask whether it would be unfair or unjust to allow the statute of limitations to
 4 act as a bar to [a plaintiff's] claim." *Beauperthuy* 2007 WL 707475 at *7-8
 5 (internal citations omitted)².

6 In *Partlow*, the Ninth Circuit held that equitable tolling in an FLSA action
 7 was proper to prevent the expiration of plaintiffs' claims because of delays in the
 8 case not due to the fault of the plaintiffs. *Partlow v. Jewish Orphans' Home of*
 9 *Southern Cal., Inc.*, 645 F.2d 760-61. In *Partlow*, the Ninth Circuit set forth two
 10 factors that warrant a toll in FLSA actions: 1) plaintiffs themselves have done
 11 nothing wrong and 2) "the practical effect of not tolling the statute would be to bar
 12

13 *Countrywide Financial Corp.*, 2009 WL 1384975, *1 (N.D. Cal. Feb. 24, 2009) (granting
 14 motion to toll statute of limitations while case stayed during the California Supreme Court's
 15 review of *Brinker.*); *Self v. TPUSA, Inc.*, Case No. 08-cv-395, 2009 WL 273326, * 5 (D.Utah,
 16 February 4, 2009) (granting tolling to FLSA collective action plaintiffs); *Stickle v. SCI*
 17 *Western Market Support Center, L.P.*, 2008 WL 4446539, *22 (D.Ariz. Sept. 30, 2008)
 18 (applying FLSA tolling where (1) defendant would not be prejudiced; and (2) without the
 19 tolling "the inherent benefits of the collective action [would]disappear"); *Baldozier v.*
 20 *American Family Ins. Mutual*, 375 F.Supp.2d 1089, 1092-93 (D. Colo. 2005) (granting
 21 equitable tolling back to date complaint was filed where defendant refused to provide contact
 22 information for class members). *Cf Owens v. Bethlehem Mines Corp.*, 630 F.Supp. 309
 23 (S.D.W.Va. 1986) (applying equitable tolling of statute of limitations in ADEA context
 24 where ruling on motion for certification was not issued until more than a year after the
 25 motion was filed).

26 ² The Tenth Circuit has not ruled on the standard to be applied for equitable tolling in
 27 FLSA cases, although several district courts in the Tenth Circuit, including the District of
 28 Kansas, have analyzed the issue using various standards. *See e.g., Smith v. BNSF Railway*
Co., 246 F.R.D. 652 (D.Kan. 2007) (analyzing issue under Tenth Circuit's test for equitable
 tolling in Title VII cases and under the Sixth Circuit's factor test for equitable tolling under
 the FLSA); see also *Allison v. Frito-Lay, Inc.*, 1992 WL 123799, *4 (D. Kan. March 27,
 1992) (analyzing FLSA equitable tolling argument under Title VII test of "active
 deception.").

1 forever any claim" the employees had against the defendant. *Partlow*, 645 F.2d at
 2 760. As a policy matter, the Ninth Circuit reasoned a toll is particularly necessary
 3 when the delay will prevent the employees' claims from even being heard.
 4 *Partlow*, 645 F.2d at 760.

5 As discussed in the next section, the Plaintiffs in the Related Cases satisfy
 6 the two-part test set forth by the Ninth Circuit in *Partlow* to warrant a toll of the
 7 FLSA statute of limitations.

8 **IV. ANALYSIS**

9 **A. Equitable Tolling is Justified in this Case To Prevent The Loss of** 10 **Class Member Claims**

11 Circumstances exist in this litigation to justify equitable tolling. In *Israel*
 12 *Antonio-Morales*, the United States Department of Justice filed a motion to stay
 13 plaintiffs' FLSA collective action pending prosecution of a criminal case against
 14 defendants. 2009 WL 1591172 at *1 (E.D. La. April 20, 2009). Plaintiffs did not
 15 oppose the stay but requested equitable tolling of the statute of limitations, which
 16 was granted by the Court:

17 The Court finds that equitable tolling is particularly appropriate in
 18 this case. Potential opt-ins stand to forfeit their claims through no
 19 fault of their own during the pendency of the stay, and Plaintiffs'
 20 counsel will be precluded from seeking judicial assistance pursuant to
 29 U.S.C. § 216(b) to obtain information necessary to effectively
 issue notice to affected workers.
Id. at *1-2.

21 If not tolled, the statute of limitations could act to deprive consenting
 22 employees of their right of action. *Partlow*, 645 F.2d 761; see also *Lee v. ABC*
 23 *Carpet & Home*, 236 F.R.D. 193, 199 (S.D.N.Y.2006) (holding that "the time
 24 during which a party is prevented from obtaining legal relief is not counted for
 25 purposes of statutes of limitations.").

26 Here, the related cases pending before this court have been procedurally
 27 hamstrung and delayed by consolidation and organizational issues. Following the
 28

1 transfer of the related cases and as a result of the proposed consolidation and
 2 coordination of these actions, plaintiffs have had to analyze and assess all of the
 3 various complaints and spend considerable time working to coordinate these
 4 claims.

5 As such, although the *Salazar* and *Hightower* cases have been pending for
 6 approximately nine months and counsel for both sides has been diligently
 7 prosecuting such cases, this Court has not made a determination as to Plaintiffs'
 8 collective action notification. As such, there is a real danger that the inherent
 9 benefits of the collective action "will disappear" if plaintiffs are not notified of the
 10 suit before their statute of limitations expires. Similarly, here, without tolling the
 11 statute of limitations, Plaintiffs will have lost the time between the filing of the
 12 complaints and the filing of the instant Motion that they could have used to notify
 13 potential class members. *Id.*

14 In such cases, notice to the class members is often critical. There are a
 15 myriad of obstacles facing employees who wish to file a lawsuit against their
 16 employer on an individual basis. As the California Supreme Court noted in
 17 *Gentry v. Superior Court* 42 Cal.4th 443, 785-786 (2007):

18 [e]mployees will seldom have detailed personal records of hours
 19 worked. Their case ordinarily rests on the credibility of vague
 20 recollections and requires them to litigate complex overtime formulas
 21 and exemption standards. For current employees, a lawsuit means
 22 challenging an employer in a context that may be perceived as
 23 jeopardizing job security and prospects for promotion. If the
 24 employee files after termination of employment, the costs of litigation
 may still involve travel expenses and time off from work to pursue
 the case, and the value of any ultimate recovery may be reduced by
 legal expenses...Third, some individual employees may not sue
 because they are unaware that their legal rights have been violated....it
 may often be the case that the illegal employer conduct escapes the
 attention of employees.

25 Similarly, in this case, employees who may not have the knowledge or
 26 resources to enforce their rights individually may nevertheless relish the
 27 opportunity to opt-into this case, however, if the statute of limitations is not tolled
 28

1 many individuals may be barred.

2 The situation presented by this litigation is similar to the circumstances in
3 *Israel Antonio- Morales* and the Bank of America MDL litigation in which Marlin
4 & Saltzman, one of the plaintiffs' counsel is involved. In the Bank of America
5 MDL litigation, much like the case at bar, the Bank of America MDL plaintiffs'
6 efforts at discovery and collective action certification were stalled through no fault
7 of their own. Here the process of consolidating the various related cases,
8 negotiating a discovery plan and formulating a lead counsel structure has taken
9 several months. While counsel for Plaintiffs and Defendant have been negotiating
10 regarding the class list, no contact information has been provided to date and, thus,
11 no notice regarding these consolidated cases has been provided to the class.
12 Although the parties and the Court have diligently endeavored to expedite this
13 process, the claims of injured class members are nevertheless being lost. An
14 equitable toll will allow the parties and the Court to organize the case, engage in
15 full and proper discovery and permit plaintiffs a full opportunity to prepare their
16 motion for collective action certification.

17 **B. Defendants Will Not be Prejudiced by an Equitable Toll**

18 The Ninth Circuit has also reasoned that a toll is proper when defendants
19 will not face substantial hardship in defending the claims. *Partlow*, 645 F.2d at
20 761. The Ninth Court explained that a statute of limitations is designed to ensure
21 fairness to defendants and to "notify them of claims that they must defend before
22 the claims grow stale." *Partlow*, 645 F.2d at 761 (citing *Burnett v. New York*
23 *Central Railroad*, 380 U.S. 424, 428 (1965)). Defendants in a FLSA action are not
24 prejudiced once they are aware of the claims and commence their investigation.
25 Following the lead of the Ninth Circuit, courts in this district and other circuits
26 have consistently ordered equitable tolls in FLSA cases. (See, e.g., *Beauperthuy v.*
27 *24 Hour Fitness USA, Inc.*, 2007 WL 707475 at *8 (N.D. Cal. Mar. 6, 2007);
28

1 *Adams v. Inter-Con Security Systems*, 242 F.R.D. 530, 542-543 (N.D. Cal. April
 2 11, 2007); *Castle v. Wells Fargo Financial, Inc.*, 2007 WL 1105118 at *1
 3 (N.D.Cal. Apr. 10, 2007).)

4 Here, Defendant will not be prejudiced by an equitable toll. Defendant has
 5 been fully aware of its scope of potential liability for more than a year, and has had
 6 unlimited and exclusive access to the putative class members and their
 7 payroll/time records to thoroughly investigate their claims.

8 **V. CONCLUSION**

9 Based on the foregoing, Plaintiffs respectfully requests that this Court issue
 10 an order tolling the statute of limitations for the putative class member FLSA
 11 claims until the date Notice is mailed (or an order denying the mailing of notice is
 12 issued) and for any other and further relief that is just and proper.

13
 14 DATED: December 30, 2011

Marlin & Saltzman LLP

15 By: /S/ Kiley L. Grombacher
 16 Stanley D. Saltzman
 17 Louis M. Marlin
 18 Marcus J. Bradley
 19 Kiley L. Grombacher

**Co-Lead Counsel for Plaintiffs
 and Plaintiffs' Liaison Counsel**

20 DATED: December 30, 2011

Initiative Legal Group APC

21 By: /S/ Raul Perez
 22 Raul Perez
 23 Melissa Grant
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